IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN
AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

D.B. CIVIL SPECIAL APPEAL (WRIT) NO.**920/2007.**
In
S.B. CIVIL WRIT PETITION NO.3135/2005.

Smt.Sushila Devi
Vs.
Additional District & Sessions Judge (Fast Track) No.2, Jaipur District Jaipur and anr.

Date of Judgment:- August 9, 2007.

QUORUM
HON'BLE THE ACTING CHIEF JUSTICE MR.J.M. PANCHAL
HON'BLE MR.JUSTICE MOHAMMAD RAFIQ

Mr. Babulal Gupta for the appellant.

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BY THE COURT (Per: J.M. Panchal, Actg.CJ.):

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The instant appeal is directed against the order dated March 30, 2007 rendered by the learned Single Judge in S.B. Civil Writ Petition No.3135/2005 by which prayer made by the appellant to set-aside the order dated April 5, 2005 passed by the learned Additional District

and Sessions Judge (Fast Track) No.2, Jaipur District Jaipur in Civil Suit No.28/2004 refusing to receive secondary evidence of agreement to sell dated April 20, 2001, is upheld.

2) The appellant has filed Civil Suit No.28/2004 in the court of learned Additional District and Sessions Judge (Fast Track) No.2, Jaipur District Jaipur for Specific Performance of Agreement to Sell dated April 20, 2001. The case of the appellant is that the husband of the appellant who was carrying the original document dated April 20, 2001 died in a road accident on May 8, 2004 and, therefore, the original document dated April 20, 2001 was lost. Under the circumstances, the appellant filed photostat copy of the document dated April 20, 2001 and requested the court to permit her to lead the secondary evidence with regard to the agreement to sell dated April 20, 2001.

3) The learned Judge noticed that not only the original document was unregistered but it

was also unstamped. Under the circumstances, the learned Judge of the trial court vide order dated April 5, 2005 refused to take on record the secondary evidence of agreement to sell dated April 20, 2001. Feeling aggrieved, the appellant invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution of India by filing S.B. Civil Writ Petition No.3135/2005. The learned Single Judge has dismissed the petition vide order dated March 30, 2007 giving rise to the instant appeal.

4) This court has heard Mr.Babulal Gupta, learned counsel for the appellant at length and also considered the documents, forming part of the original petition.

5) The contention that the question whether the document was registered or not should have been gone into by the learned Judge at the time when secondary evidence was sought to be produced by the appellant during the course of recording of her evidence and, therefore, the learned Single Judge should have set-aside the

order passed by the trial court refusing to receive secondary evidence of agreement to sell dated April 20, 2001, cannot be accepted.

6) In **Bipin Shantilal Panchal Vs. State of Gujarat and another : (2001) 3 SCC 1**, the Supreme Court has ruled that normally question of admissibility of evidence should be gone into at the last stage of the final judgment and not at the stage when any objection is raised regarding admissibility of any material or any item of oral evidence during the pendency of a criminal trial. However, what is laid down by the Supreme Court is that the procedure indicated by the Supreme Court should be followed except where the objection relates to deficiency in stamp duty of a document. The secondary evidence of document dated April 20, 2001 which was produced by the appellant indicates that the original document was neither registered nor stamped as required by the Act and, therefore, the learned Judge of the trial court was justified in deciding the question

whether the secondary evidence of the original document was admissible.

7) In **Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao and others : AIR 1971 SC 1070,** the Supreme Court has held as under:-

> “13. The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be led in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso(a) is only applicable when the original instrument as actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfill the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 35 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document

> which is an instrument for the purpose of Section 35. 'Instrument' is defined in Section 2(14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act."

8) In view of what has been authoritatively laid down by the Supreme Court, there is no manner of doubt that the secondary evidence by way of copy of document insufficiently stamped cannot be permitted to be led in a suit even though objection of its admissibility is not taken under the Evidence Act, 1872. After interpreting Sections 35 and 36 of the Stamp Act 1899 what is ruled by the Supreme Court is that a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35 of the Stamp Act and Section 36 does not apply to the secondary evidence adduced in court, contents of document unstamped or insufficiently stamped. Under the circumstances, this Court is of the opinion that the learned

Judge of the trial court was justified in not permitting the secondary evidence which was sought to be produced by the appellant. The view taken by the learned trial Judge which is confirmed by the learned Single Judge of this Court, cannot be said to be erroneous so as to warrant interference of this Court in the instant appeal.

9) Therefore, the appeal which lacks merits, deserves to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed.

(MOHAMMAD RAFIQ), J. **(J.M. PANCHAL), Actg. CJ.**

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